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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISO DIVISION**

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| DARREN CORNELIUS STANLEY,<br>Petitioner,<br>vs.<br>RON DAVIS, Warden, California State Prison at San Quentin,<br>Respondent. | C07-4727 EMC [Related to C 14-4108 EMC]<br>**DEATH PENALTY CASE** |

**MOTION FOR DEFAULT SANCTION FOR**

**BATSON LITIGATION MISCONDUCT**

**OVERVIEW**

Discovery was stayed in the case from October 6, 2011 to May 10, 2016, including Rule 27 depositions. [Doc. Nos. 39, 125, 214.] However, in response to court-ordered Brady discovery [Doc. No. 97], the Alameda District Attorney certified that "the complete file of docket 103289, a capital case, has been retained in its entirety" and was produced. Among those papers, Petitioner's counsel recently discovered Deputy District Attorney Theodore Landswick's "big spin cards," annotated questionnaires, and voir dire notes for prospective jurors Gary L., Carol F., Hersey D., Diane B., Helen N., and Tanjala S., only. Landswick's exclusion of these jurors was the subject of two Batson v. Kentucky, 476 U.S. 79 (1986) motions at trial, was raised on appeal, and alleged in Petitioner's protective federal petition. Attached as Exhibit "A" to this Motion are the relevant 23-pages of bates-stamped discovery, DA000137-DA000138, DA 001490-DA001500, DA001502-DA0001507, DA001177-DA001788, DA001809. A few other pages of those jurors' questionnaires which Landswick didn't write on are omitted from this Exhibit. This discovery is critically-important for multiple reasons:

First, Landswick wrote the capital letter "(B)" on his "big spin cards" for each of the African-American jurors he struck (DA001506).

Second, by May 12, 2000 fax transmittal, Landswick provided his "big spin cards" to Deputy Attorney General Juliet Haley (who signed Respondent's Brief in S022224), and in the cover page alerted her to the "(B)" on those jurors' cards. (DA001505.) He also sent 15-pages of unspecified notes and/or questionnaires to DAG Haley. (DA001490).

Third, Landswick wrote the word "BLACK" on his notes for each juror (also the word "DARK" for Tanjala S.), and/or on the cover page of their questionnaires. (See DA001491, DA001495, DA001497, DA001499, DA001503-DA001504, DA001809.)

Fourth, Landswick did not write "sympathy for the defendant" on his notes for jurors Dianne B. (DA001495), Tanjala S. (DA001499), or Hersey D. (DA001809), which directly contradicts what Landswick assured the trial judge was in those notes, when the trial judge raised the Batson issue:

> Mr. Landswick: With respect to Diane Butler, I had sympathy to the defendant. With Hersey Deans, I had sympathy to the defendant. [. . . ] And with Helen Noaro, I had sympathy to the defendant [. . .] But for all four of these woman, I had sympathy for the defendant."

(18 RT 3083-84).

> The Court: I can tell you, Mr. Landswick, I didn't detect anything in her answers that would lead me to believe that she [Tanjala S.] was sympathetic.
>
> [. . .]
>
> Mr. Landswick: Her body language, the way they sit and look at the defendant. I make these notes as you conduct the voir dire, and I do –
>
> The Court: Well, that's what I want to know.
>
> [. . .]
>
> Mr. Landswick: Just I got the impression she was very sympathetic toward him and his posture, his position.

(Id. at 3094-95). The voir dire notes themselves weren't shared with the trial court or the California Supreme Court, or with any prior counsel for petitioner.

Fifth, on information and belief, the District Attorney did not preserve the rest, i.e., the vast majority, of Landswick's voir dire notes or copies of the questionnaires, despite the notice it had that these were highly-relevant to the Batson issue at trial, the entry of a preservation order by the trial court, and the more recent avowal that the capital case had been retained "in its entirety." (Teich Dec. ¶2.) Additionally, Petitioner's counsel are aware from the DA discovery that in 1994 Landswick was removed from felony trial staff, suspended for two-weeks without pay, and referred for training for a public incident in which he used the racial epithet "NIGGERS" three times in Department One.

(DA000056, DA000058-59, DA000063-DA000064.) In another case, Landswick referred in court to Fremont Vice Mayor Tony Azevedo as "no dumb Portugee." (DA000099-DA000100.)

On appeal, DAG Haley argued that Landswick "offered race-neutral justifications for excusing each African-American prospective juror and the trial court found his explanations satisfactory" (Respondent's Brief on Appeal at 109.) She referenced "notes he had taken during voir dire[,]" and artfully suggested that peremptory challenges are often made "on the basis of an attorney's intuition [] informed by a juror's glance, voice inflection, or something even more difficult to define, such as a juror's demeanor, manner or comportment." (Id. at 114, 116.) In oral argument before the California Supreme Court DAG Haley argued:

> As this Court is pointing out in these discussions, the reason given by the prosecutor was that, as in-artful as it is – and it is not the greatest record, but as I think your Honor pointed out, this was conducted after Hovey voir dire that took three months, some 225 jurors, the prosecutor came down having his notes, not having his notes, but having made a notation saying "sympathy for the defense. Sympathy for the defense" And, when you look at the record which you are entitled to do in assessing whether or not the trial court's determination, its credibility assessment is supported: Nothing in the record contradicts Mr. Landswick's stated reason that these particular jurors were sympathetic to the defendant. And, it is that evidence that we believe that this Court should look at. [] This is the record that was before the trial court, when he was making that credibility assessment - that the prosecutor was saying "sympathy for the defendant." [. . .] Notably, the prosecutor said 'I challenged more Caucasian women on the same basis, same kind of answers. He was saying "I'm applying the same standard that's not race-based,' and the record supports that."
>
> [. . . ]
>
> Ultimately, this Court and the High Court has said that these kinds of decisions fall to the trial judge to make that credibility assessment, and I think what this record demonstrates that Judge DeLucchi took that role very seriously [. . . ] He felt confident that this prosecutor was sincere and telling the truth [that these were not race-based reasons for challenging these jurors].

(Teich Dec. ¶3.) Respondent's written and oral arguments were false and deceptive in light of the true facts which Landswick had made known to DAG Haley, that Landswick's "big spin cards" prominently referenced each struck juror's race with a "(B)", and did not bear the "sympathy" rationale for four of those five female African-American jurors, and that Landswick's voir dire notes profiled those jurors' race by use of the terms "BLACK" or "DARK." Again, the California Supreme Court did not have Landswick's notes, and neither did the defense – until now.

In People v. Stanley 39 Cal. 4th 913, 937-45 (2006), the California Supreme Court accepted DAG Haley's representation that for all four of the remaining African-American female jurors (Carol F. Hersey D, Diane B. and Helen N,), Landswick "had written down in his voir dire notes 'sympathy for the defendant' as the reason for the peremptory excusal of each of them." (See also id. at 941-42 ("in his notes, on which he had to place principal reliance[,] [he] had simply jotted down "sympathy for the defendant" as a notation of his concerns[.]) The Court also accepted DAG Haley's assertion that Landswick's reliance upon notes he had made of Tanjala S, the fifth African-American female prospective juror, - purportedly of her "body language, the way they sit and look at the defendant" (what Landswick termed "intangible signs") – in fact and in truth provided a race-neutral reason for her excusal. (Id. at 943.) Thus, based on Landswick's original representation, which DAG Haley's relied upon on appeal, the California Supreme Court made a finding of fact that Landswick wrote in his voir dire notes as to all four women, "sympathy for the defendant." That is not true. (Exh. "A".)

By June 22, 2016 letter, Petitioner's counsel provided the DA discovery to Respondent and urged Respondent to acknowledge that its prior representations to the California Supreme Court on the Batson issue did not meet that test of complete candor. (Exh. "B".) More to the point, the Batson opposition is no longer tenable in light of that portion of Landswick's voir dire notes which have now surfaced, and the District Attorney's destruction of the rest. Petitioner's counsel proposed that, in the interest of comity, Respondent should agree to toll the deadline for filing a finalized petition in Court, while it confessed error in the Supreme Court, such that a remand would issue to the Superior Court for retrial. See Crittenden v. Chappell, 804 F.3d 998, 1003 (2015) (Batson is structural error). At that point, the Superior Court could evaluate the evidence of permanent incompetency which moved this Court to observe that Petitioner "can never be retried and likely would remain a ward of the state for the rest of his life." [Doc. No. 106 at 4.] By June 24 email, Respondent's counsel stated,

> We decline your request for a confession of error. We further decline your request to agree to equitable tolling. Finally, we disagree that you are entitled to Rule 37 sanctions. We do not respond to your Rule 26 discussion concerning a subpoena you served on the District Attorney's Office, as the matter does not concern or involve the Office of the Attorney General.
>
> Please note that we consider any duty we may have to meet and confer on these subjects to be discharged with this response.

(Teich Dec. ¶4.)

## ARGUMENT

Prosecutors have a duty of candor to the court. (See ABA Model Rules of Prof'l Conduct R. 3.3 (2002).) In particular, the state's lawyer must inform the tribunal of all material facts known to that lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. (Rule 3.3(a)(4), (d).) DAG Haley breached that standard by perpetuating Landswick's misstatements regarding his voir dire notes in order to defeat the Batson claim on appeal. See e.g., Whaley v. Belleque, 520 F.3d 997, 1002 (9th Cir. 2008) (attorney has ethical obligation to represent to the court her view of the facts or law as she honestly perceives it, not just that portion that favors the immediate result she seeks); Russell v. Rolfs, 893 F.2nd 1033, 1038 (9th Cir. 1990) (attorney general's duty to advise courts is best met with candor, not misdirection).

Respondent's prior Batson litigation position was flatly inconsistent with evidence within its possession that Landswick's "B", "BLACK," and "DARK" notes and pattern of racial epithets showed that "race was a substantial motivating factor" in his use of at least one (and doubtless, all) peremptory strikes. Currie v. McDowell, 2016 U.S. App. LEXIS 10362, **4-5, 27 (9th Cir. June 8, 2016) (citing Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010)). Petitioner need not demonstrate that racial motivation was "determinative" in all of Landswick's strikes. Snyder v. Louisiana, 552 U.S. at 485 (citing Hunter v. Underwood, 471 U.S. 222, 228, (1985).

Were there any doubt on that point, both the United States Supreme Court and the Ninth Circuit have reaffirmed it recently in cases on similar facts. In Foster v. Chatman, 195 L. Ed. 2d 1, **4, 21-23 (2016), the prosecutor's rationales for juror strikes were belied by his racial designations of those jurors in the notes themselves ("B#1", etc.), which are functionally identical to Landswick's. (Id. at **25-29.) "The sheer number of references to race in that file is arresting." (Id. at *42; see also Currie, supra (Batson relief based, inter alia, on prosecutor's past violations); Mitcham v. Davis, 103 F. Supp. 3d 1091, 1105 n.6 (ND Cal 2015) (prosecutor identified African-American jurors with "B"'s, but didn't keep track of any other jurors' race). Race was not a Q. on the questionnaire. Thus, Landswick's "B," "BLACK," and "DARK" weren't "shorthand" for anything but race, and it further demeans the Office of the Attorney General to maintain otherwise. By the loss of the rest of Landswick's jury selection file, this Court should infer he did not mark "W" or "WHITE" for Caucasian jurors, and that these were destroyed for an improper purpose. Comparative juror analysis strongly confirms that Landswick's stated concerns were pretext.

The default sanction is warranted for this extraordinary circumstance under Rule 37 and this Court's inherent authority to manage the integrity of its proceedings. First, DAG Haley's factual representations to which the California Supreme Court deferred created a false and misleading record below. She had the notes that showed Landswick expressly referenced the race of the African-American jurors, and that his "sympathy" and "intangible signs" rationales were pretexts. DAG Haley had the duty to share the notes with the California Supreme Court yet she maintained the fiction that the notes actually supported Landswick's trial position.

Second, the District Attorney destroyed the rest of Landswick's notes, despite their obvious relevance to Batson litigation, a trial court preservation order, and their avowal that the capital case record was retained "in its entirety." This was spoliation of evidence as a matter of law. United States v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir. 2002) (fault lies where party had "some notice that the documents were potentially relevant to the litigation before they were destroyed.") The DA's purge of the rest of Landswick's notes and his copies of questionnaires meets that standard, and "threatens to interfere with the rightful decision of the case." Anheuser-Busch, Inc. v. Nat. Beverage Distributors, 69 F.3d 337, 354 (9th Cir. 1995).

This Court has ample Rule 37 and inherent authority to sanction a party by terminating their case for playing fast and loose with the facts. Leon v. IDX Sys. Corp., 464 F.3d 951, 958-59 (9th Cir. 2006) (dismissal sanction is warranted where a party has engaged in deceptive practices that undermine the integrity of judicial proceedings).; Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 n.2 (9th Cir. 1992); Fjelstad, 762 F.2d at 1338. When considering a default sanction in response to spoliation of evidence, the court must determine "(1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the efficacy of lesser sanctions, [and] (4) the relationship or nexus between the misconduct drawing the [default] sanction and the matters in controversy in the case." Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988). In addition, the court may consider the prejudice to the moving party as an "optional" consideration where appropriate. Id.

In its second equitable tolling Order, this Court treated the protective petition as a petition for purposes of timeliness analysis. [Doc. No. 26 at 1, 4.] Here, the protective petition will serve as a fully-exhausted petition for purposes of pleading the Batson issue [Doc. No. 5 at 119-150], and grounding case-dispositive relief under Rule 37(b)(2)(A)(v), and as an exercise of the Court's inherent power. Landswick's extant voir dire notes are proof of racial-profiling, and they utterly belie all of the State's prior representations in this case on the Batson issue. The State's attorneys' deceptive tactics in misrepresenting the content of those notes in the trial record – and on appeal, exalting the trial record as dispositive - undermined the rightful decision of the case both at trial, and on appeal. See Advantacare Health Partners, LP v. Access IV, 2004 U.S. Dist. LEXIS 16835, *14 (N.D. Cal. 2004) (Fogel, J.) (citing Valley Engineers, Inc. v. Electric Eng'g Co., 158 F.3d at 1057-58). See also Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337, 348 (9th Cir. 1995) (holding that it is "well-settled that dismissal is warranted where... a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings").

Moreover, the DA committed spoliation as a matter of law by disposing of the vast majority of his notes and annotated copies of questionnaires, despite their obvious relevance to the Batson issue raised at trial, the entry of a preservation order by the trial Court, and the DA custodian's 2013 avowal that the capital case-file had been maintained "in its entirety." Leon, 464 F.3d at 961; see also Wyle v. R.J. Reynolds Tobacco Co., 709 F.2d 585, 591 (9th Cir. 1983) (upholding dismissal where the district court determined that "the deliberate deception and irreparable loss of material evidence justified the sanction of dismissal").

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that the Court enter a default judgment for Petitioner on the Batson claim alleged in Doc. 5 at119-150, on the ground that the State's attorneys have committed a fraud on the Courts by their joint and several acts of misconduct in prior litigation of that claim.

Dated: July 1, 2016

/s/
Roger I. Teich

## CERTIFICATE OF SERVICE

Case Name: __**Stanley v. Davis, Warden**___ ______ No. **C-07-4727 EMC**__

I hereby certify that on July 1, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**MOTION FOR DEFAULT SANCTION FOR BATSON LITIGATION MISCONDUCT**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I declare under penalty of perjury under the laws of the United States the foregoing is true and correct and that this declaration was executed on July 1, 2016, at San Francisco, California.

______Roger I. Teich________ __/s/ Roger I. Teich __________

Declarant Signature